No. 274. 58.

APR 16 19

In the Supreme Court of the United States.

Brf. of Harvey for D. E.

October Term, 1900.

No. 274.

Filed April 16 1901.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST H ZERNECKE, DECEASED,
Defendant in Error.

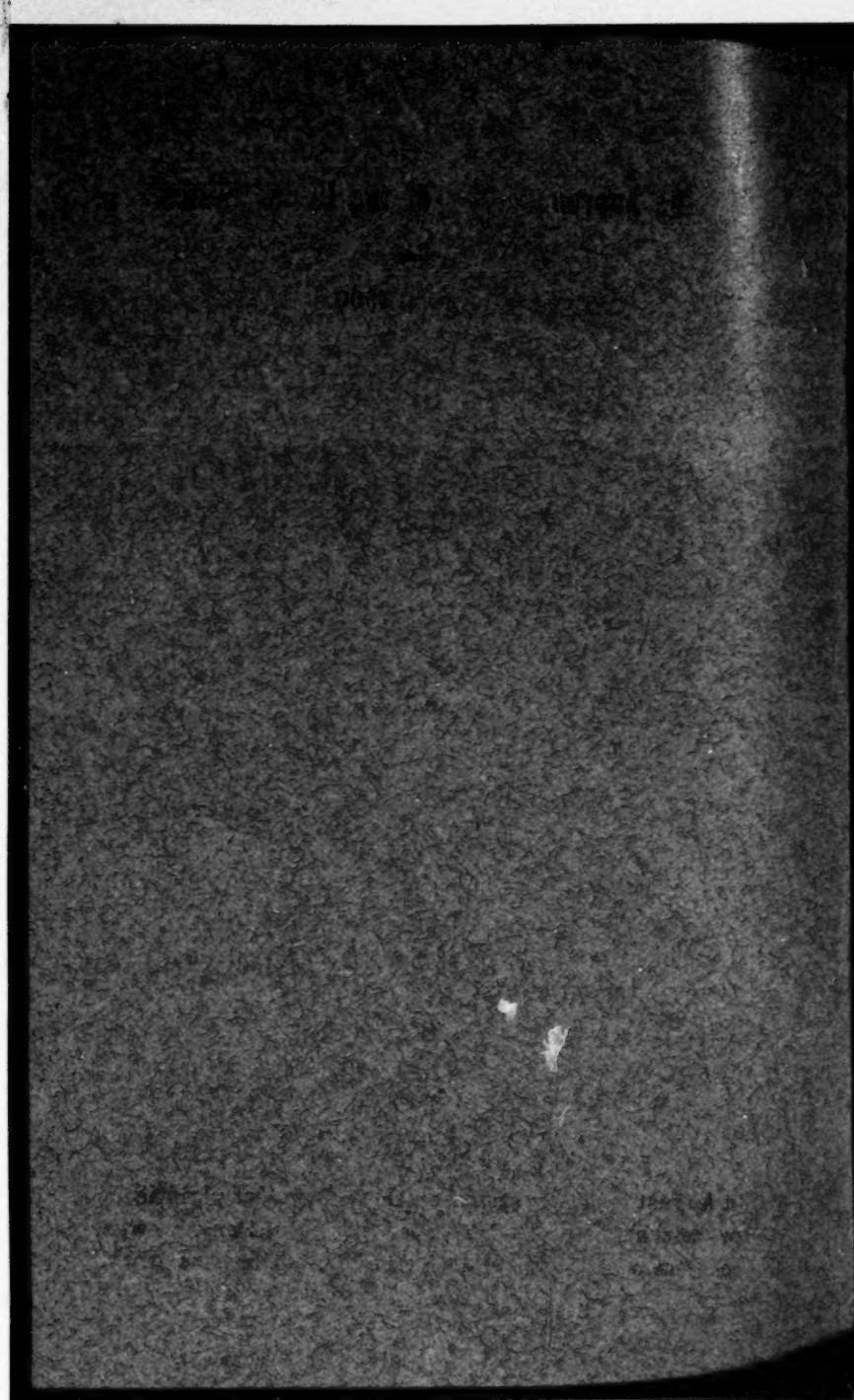
ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendant in Error.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.

A. E. HARVEY,
Of Counsel.

BEDELL PRINTING CO., LINCOLN, NEB.



In the Supreme Court of the United States.

October Term, 1900.

No. 274.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

BERTHA ZERNECKE, ADMINISTRATRIX OF THE ESTATE OF ERNEST H ZERNECKE, DECEASED,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Argument and Brief of Defendant in Error.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.

A. E. HARVEY,
Of Counsel.

STATEMENT.

On August 9, 1894, a train on the railroad of plaintiff in error in which Ernest Zernecke was a passenger, was wrecked near Lincoln, Nebraska, causing his instant death.

The defendant in error, as administratrix, brought this action in the district court of Thayer County, Nebraska, to recover from the railroad company damages resulting to the widow and children, by reason of such death. The wreck was caused by the train being derailed while running at a high rate of speed across a bridge about twenty feet high. Trial was had resulting in a judgment on November 19, 1896, in favor of defendant in error, for $4,500.00, from which judgment the company prosecuted proceedings in error to the supreme court of Nebraska. On March 7, 1900, the judgment of the district court was affirmed by such supreme court. The case now comes to this court from the supreme court of Nebraska on a writ of error to reverse its said judgment of affirmance.

Section 3, article 1, chap. 72 of the Compiled Statutes of Nebraska, provides as follows:

> "Every Railroad Company as aforesaid shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road, actually brought to his or her notice."

The supreme court of Nebraska has repeatedly construed its term "criminal negligence" in this statute to mean "gross negligence."

C. B. & Q. R. R. vs. Hague, 48 Nebr., 97.

C. B. & Q. R. R. vs. Landauer, 39 Nebr., 804.

U. P. R. R. vs. Porter, 38 Nebr., 226.

M. P. R. R. vs. Baier, 37 Nebr., 254.

F. E. & M. V. R. R. vs. French, 48 Nebr., 638.

C. B. & Q. R. R. vs. Wolfe, 85 N. W. Rep., ——

Section 110, chapter 16, of the same statutes provides:

"In case any passenger on any railroad shall be injured while on the platform of a car while in motion, or in any baggage, wood or freight car in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided said company furnished room inside its passenger cars sufficient for the accommodation of its passengers."

The foregoing statutes were enacted in the year 1867, and long before the plaintiff in error was incorporated or owned or operated any railroad in the state.

Upon the trial in the district court the railroad company offered evidence tending to show that the derailment of the train in question was not caused by any negligence on its part, but by the act of a third party who purposely wrecked the train. This evidence on objection was excluded, the court holding that under the Nebraska statute the question as to whether the railroad company was negligent was immaterial. No evidence was given or offered tending to show that the deceased was guilty of any contributory negligence. The court instructed the jury in accordance with the provisions of the foregoing statute.

BRIEF AND ARGUMENT.

It is contended that the statute of Nebraska whereby railroad companies are made absolutely liable for all injuries sustained by passengers while being transported, except such as are occasioned by the negligence of the passenger, is unconstitutional in that it deprives such railroad company of its property without due process of law, and deprives it

of the equal protection of the laws. *This was the only constitutional question raised before the Nebraska supreme court. (Last assignment of error, page 6 of record.)*

The statute did not deprive the plaintiff in error of its property without due process of law.

The statute has been assailed by the railroad company as being unjust and unreasonable, and imposing on it a liability for injuries occuring without any fault on its part, thereby depriving it of its property without due process of law. It is true the statute extends the rule of absolute responsibility for the safe carriage of persons that heretofore obtained at common law, for the carriage of property, but such rule, we contend, is based on sound reason, is within the police power of the state, and is in accord with that principle of an advanced civilization which holds sacred human life and protection of the person.

The statute has been upheld in a large number of cases by the supreme court of Nebraska. See

Chollette vs. Railroad Company, 26 Nebr., 159.
Railroad Company vs. Chollette, 33 Nebr., 143.
Railway Company vs. Baier, 37 Nebr., 235.
Railway Company vs. Porter, 38 Nebr,, 226.
Railroad Company, vs. Hague, 48 Nebr., 97.
Railroad Company vs. Landauer, 39 Nebr., 803.
Railway Company vs. Chollette, 41 Nebr., 578.
Railroad Company vs. Hedge, 44 Nebr., 448.
Railroad Company vs. French, 48 Nebr., 638.
Railroad Company vs. Young, 58 Nebr., 678.
Railroad Company vs. Zernecke, 59 Nebr., 689.
Railroad Company vs. Wolfe, 85 N. W. Rep., decided March 21, 1901.

In the cases of Railway Co. vs. Porter, Railway Company vs. Baier, and in Railroad Co. vs. Chollette, 41 Nebr., 578, the constitutionality of the statute was directly drawn in question. In was contended in those cases that the statute violated the provisions of the State and United States constitutions in that it deprived the railroad company of its property without due process of law and denied them the equal protection of the law. In each of those cases the statute was upheld on both points as constitutional.

In the case of Chicago etc., R. R. Co., vs. Young, 58 Nebr., 678; 79 N. W. Rep. 556, the supreme court of Nebraska in passing upon the validity of the statute says:

> "The act of June 22, 1867, making railroad companies liable in the absence of negligence for injuries to passengers on their trains is justifiable legislation under the *police power* of the state. It aims to promote safety in travel, and neither deprives such companies of their property without due process of law, nor denies them the equal protection of the laws."

To show the necessity of such an enactment, we need but to refer to the common law rule and the reasons which caused its adoption

In Hutchinson on Carriers, Sec. 495, it is said:

> "Public carriers may not only be carriers of goods, but carriers of persons also, and while carrying the goods, may at the same time carry their owners. As to the one in such a case, the carrier would be a passenger carrier, and as to the other a common carrier of goods; and although he might carry them both on the same conveyance, and at the same time, the nature of the responsibility which he would incur as to them would be very different; and this difference in the kind of rseponsibility which the law imposes upon him exists even between the passenger and his baggage, as to which, as have seen, the carrier becomes responsible as a common

carrier of goods, although its carriage is merely incidental to the carriage of the passenger. Of the goods, he must have, in order to impose upon him the responsibility of a common corrier, the absolute and unlimited control, and the law supposes that their safety, aside from the acts of God and the public enemy, against which it protects him, depends entirely upon the care and faithfulness with which he discharges his trust. But the passenger being endowed with intelligence, and the power of locomotion, which enable him in a great measure to foresee and avoid danger, the exercise of at least ordinary prudence is required on his part to escape it, and if by failure to exercise these facilities for his own preservation, a misfortune befall him, though the carrier may have been in fault, it will be attributed to his own carelessness and inattention, and the responsibility will not be thrown upon the carrier."

The proposition that carriers ought not to be liable for injuries to passengers because the latter are presumed to be able to foresee and avoid danger, might have had some reason to support it in the days when travel was by the slow going stage coach; but to apply it to the case of passengers traveling at the rate of fifty or sixty miles per hour on a railroad in the present day, would be ridiculous in the extreme. What chance had the passengers in the ill-fated train in question to foresee and avoid danger? One moment they sat in supposed safety, and the next moment were crushed and dying. No opportunity was given them for the exercise of foresight and care. Under such conditions, what reason is there in a rule which says to the Rock Island Railroad Company: "You are liable for the baggage destroyed in this wreck but not for the injuries sustained by such passengers to their persons."

The supreme court of Nebraska in its latest decision upon this question, C. B. & Q. R. R. vs. Wolfe, 85 N. W. Rep., —— decided March 21, 1901, thus states the reasons why the

statute does not violate the fourteenth amendment to the constitution:

"It is sufficient to say that we are content with the soundness of the conclusions arrived at relative thereto and see no reason for abrogating or modifying them. The statute so strenuously attacked was progressive in its nature. The legislature in passing it took into consideration the fact that since the time the liability of of common carriers became fixed at common law through the decisions of court, the means of travel have become revolutionized. From comparatively safe and easily controlled means of travel, invention has progressed until the means have become a complicated and exceedingly dangerous machine propelled through space at an extremely rapid rate of speed and with the workings of which the public were unfamiliar and over which they had not the slightest control. Considering then the old law and the mischief that has arisen through the application of the inventive genius of the age to the means of locomotion, the legislature rightly conceived that the old law relative to the liabilities of common carrier in the respect indicated by this legislation has become obsolete, and it therefore proceeded to exercise the function for which it had been created, by curing that wherein the old law had become defective and inapplicable to modern conditions. Added to this, perhaps, was the consideration that there was no reason for making common carriers insurers of the safety of personal property confided to them that would not apply with equal force to the owners of that property where their persons were being transported from point to point, except, perhaps, those indicated by the exceptions contained in this law. It would seem that in law the owner should at least be equal to if not 'A little better than his dog, a little dear er than his horse.' This equality the law establishes, excepting from such liability the common carrier only in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger."

In the case of Clarke vs. Russell. 38 C. C. A. Rep., 541, the question of the constitutionality of this statute was raised

and the statute upheld. The court of appeals in its opinion in this case says:

"A railroad company owes a duty to its passengers to carry them safely. A passenger is powerless to protect himself from injury resulting from derailment or wreck of the car, or from other causes. He is in the care and keeping of the railroad company, and has no knowledge of the railroad, rails, cars, locomotive, engines or other appliances or fixtures, or of the management and conduct of the train; or of the fitness of its employees and is frequently unable to locate the cause of the wreck and convict the company of negligence though the company may have been guilty of negligence. The company in such cases can easily produce evidence of due care which the passenger cannot be prepared to meet. It was considerations similar to these that led to the legislation making the railroad company absolutely liable for the damages resulting from fire escaping from its locomotive engines, and we may add that they are quite as forcible as any that are given for the adoption of the rule that made a common carrier insurer of the goods intrusted to him for carriage.

"It is settled by all the authorities that the carrier is an insurer of the passenger's baggage; and when the rule has not been changed by statute, we have this anomalous condition, that when a passenger and his baggage are injured in the same wreck the railroad is liable for damages done to the baggage irrespective of its negligence. The Nebraska statute does away with this and puts the passenger and his baggage on very much the same footing. And why not? There would seem to be more reason for protecting the passenger than his baggage. When a passenger without any fault on his part is injured, why should not the railroad company compensate him therefor? Grant that the company was innocent of any negligence or intent to injure him; the fact remains that it did injure him; and where one or two innocent persons must suffer a loss, why should not the one who inflicted the injury be required to bear the burden? It is quite clear that a common carrier of passengers who conducts its business by the powerful agency

of a railroad, the right to use which is derived from the legislation of the state, may be required by the state to compensate its passengers for injuries it inflicts upon them independent of any question of its own neglegence. Such a statute cannot be distinguished in principle from those we have referred to imposing an absolute liability for the loss of property by fire, or from the common law rule which imposes an absolute liability for the loss of the passenger's baggage. Both upon principle and authority the Nebraska statute is a valid enactment."

We have quoted thus fully from the opinion in the foregoing case for the reason that it sets out with clearness and force reasons which we contend sustain the statute in question. The fact that in the case of a wreck the company may be guilty of negligence and yet the passengers be utterly unable to prove such negligence, furnishes a most potent reason for the enactment of the statute. It was this consideration, among others, that led to the adoption at common law of the rule making a common carrier of goods absolutely liable for the safe carriage and delivery of property intrusted to him.

In the case at bar, probably a majority of the persons sons familiar with the circumstances surrounding the wreck, believe that the derailment of the train was due to the high speed at which it was running, coupled with some defect, and that the ignorant colored man who happened near the scene of the wreck had nothing to do with it, and has been made a scape-goat to relieve the company of responsibility. Conceding for the purpose of the argument that the wreck was actually caused as claimed by the company, by the criminal act of one Geo. W. Davis, due diligence in the matter of inspecting its track, might have prevented the derailment. A law that holds a railroad company absolutely liable for all injuries to passengers furnishes a powerful inducement to the exercise of the highest possible degree of diligence

and care on the part of such company to avoid such accidents. While injuries to passengers by derailment of trains or otherwise, on account of the high rate of speed, produced by the powerful agency of steam must always occur, yet a state enactment that directly tends to reduce injuries so caused to a minimum, is certainly a valid exercise of the police power of the state. Instead of holding the Nebraska statute invalid, we submit that this court should give it unqualified approval as being a wise and prudent rule designed for the safety of passengers, as well as for their remuneration for damages sustained in case of injury.

(b)

It will be observed that the statute in question gives the railroad company the right to make such rules as it may deem proper and necessary regulating the conduct and movements of the passengers while on its train, and if the passenger be injured while violating any such rule, the company is not liable. Any act which would amount to negligence by a passenger of his personal safety may be forbidden. The company may by rule require the *highest degree* of care by a passenger, and may by its rules forbid acts and movements that in the slightest degree tend to expose the passenger to injury. This provision of the statute alone renders baseless the criticism urged against which provides that "criminal negligence" only on the part of passengers will defeat recovery and that the passenger may be guilty of ordinary negligence and still recover damages.

The railroad company may make such rules as will bar recovery in the case even of slight negligence.

(c)

So far as plaintiff in error seeks to avail itself, in this case, of any claim that this statute deprived it of any defense of contributory negligence, either slight, gross or ordinary, it presents a hypothetical and not a real question. In the case at bar the plaintiff in error neither proved nor offered to prove any contributory negligence on the part of the deceased. The evidence and offers of proof by plaintiff in error were directed solely to the disproof of negligence on its part. The supreme court held in the Zernecke case (of which the Eaton case is a counterpart as to the plaintiff's in error evidence) that there was "an entire absence of evidence" to bring it within the statutory exceptions. See opinion of court in Zernecke record page 175 at top of page. In the offers of proof which embrace the most of the record in the case after page 41, the court will not find any evidence or offer of proof of any contributory negligence whatever. Therefore a reversal by this court for such a reason would give the plaintiff in error the benefit of a construction of the statute that it was not in position to claim, nor did claim in the trial or since. Moreover the latest construction put upon the statute by the supreme court of Nebraska in the case of C. B. & Q. vs. Wolfe, 85 N. W. Rep., ——, decided March 21, 1901, renders the statute invulnerable to this objection. The court holds a railway not liable to the passenger "*in such instances as those wherein his judgment should guide him and prompt him to avoid a threatening danger.*"

The circuit court of appeals of the 8th circuit in a late case, Clark et al., Rec'rs vs. Zarniko, 106 Fed. Rep., (decided Feb. 25, 1901) held that this statute does not make the railway company an insurer, but merely raises a presumption of negligence, and that contributory negligence is a

defense, at least when it is gross. Until a case is prosecuted to this court in which a railway company has been deprived of a defense that it has, and is ready to prove, it would seem that the objection that the statute may not allow such defense is premature.

(d)

But pursuing the argument, as if a case were actually before the court involving all these questions, yet we contend that the Nebraska statute, in thus raising the duties and liabilities of a railway passenger carrier above those imposed by the common law, to those of an insurer except as to the passenger's gross negligence, and except as to his violation of the rules by the railway prescribed, does not deprive the plaintiff in error of its property without due process of law.

1st. The statute was passed in 1867, long before plaintiff in error was incorporated or entered the state. But had it been passed after it had been in the state, the law applied only to the future, and the state can change the liabilities of corporations, and can regulate their relations to the public and their passengers and legislate for their lives and safety.

R. R. Co. vs. Mackey, 127 U. S. 205.

2nd. This law is essentially a police regulation. It is not a regulation of general property rights, nor is it a punishment for the non-payment of debts in general, as was the statute in the case of R. R. Co. vs. Ellis, 165 U. S. 150. It applies solely to cases involving the life and safety of passengers, as the Kansas statute passed upon in the case of A. T. & S. F. R. R. vs. Mathews, 174 U. S. 96, applied solely to cases of loss by fire. It is so construed by the Nebraska supreme court.

3d. It is urged that it changes the common law relations of carriers to passengers. In truth, the carriers have changed the relations between themselves and their passengers existing when the rules of the common law were fixed, by adopting the results of invention, so that travel has been revolutionized. They cannot complain if courts and legislatures take knowledge of these vast changes and legislate to meet the new conditions.

4th. The common law rules of liability and of evidence of liability are not such that they may not be changed when the security of the citizens requires it. This court has repeatedly held that laws having special effect on railways, and changing their relations and liabilities to the public from those under pre-existing laws violated no constitutional right. In R. R. Co. vs. Beckwith, 129 U. S., 26, this court upheld a statute of Iowa that was open to the same objections urged against this statute. Such statute made railroads liable for stock killed, independently of whether the railway was negligent or not, and the only exception was the wilful negligence of the person damaged, in this respect much broader than the Nebraska statute.

The Iowa statute imposed no duty to fence, except as implied from the liability imposed by the failure to do so, and required the payment of double damages, and took away contributory negligence as a defense unless it was wilful. In Nebraska a statute almost identical, found in the section preceding this passenger statute and a part of the same act has been many times upheld by the Nebraska supreme court. In R. R. Co. vs. Humes, 115 U. S. 512, this court sustained a Missouri statute making railroads liable absolutely for all stock killed where they had failed to fence, without regard to contributory negligence, the law providing that where fences were erected the railway was liable

only for negligence or wilful injury. The Nebraska statute and these statutes embody the same principles, the only difference being the occasion calling for their application, the one occasion being to enforce a new statutory or implied duty to fence, the other the old common law duty to safely carry the passenger. The duty owing the passenger is certainly as great as the statutory duty. In the recent case of R. R. vs. Mathews, 169 U. S., 65, the statute made the railway company absolutely liable as insurers against damages by fire communicated from their engines. This liability was not predicated on the violation of any statutory duty but on the principle of the general duty owing by railways to prevent destruction by fire. "To require the utmost care and diligence" says Justice Gray in this case, "of the railway corporations in taking precautions against the escape of fire from their engines, might not afford sufficient protection to the owners of property in the neighborhood of the railroads. When both parties are equally faultless, the legislature may consider it to be just that the duty of insuring private property against loss or injury caused by the use of dangerous instruments should rest upon the railway company, which employs the instruments and creates the peril for its own profit rather than upon the owner of the property who has no control over or interest in those instruments."

The validity of such a statute does not depend on the giving by it of an insurable interest to the railroad company, for this court in A. T. & S. F. R. R. vs Mathews, 174 U. S., 96, sustained a Kansas statute making the railway liable for damages caused by fire, when there was no provision in the statute giving such insurable interest.

But if the right to insure against such losses is to be considered a reason for upholding the statute, yet it was not

necessary for this statute to give the railroad an insurable interest against loss by such accidents, for the reason that the railway had the undoubted right to insure against its losses as a common carrier, whether they arose from negligence or accident. Such indemnity insurance is now one of the commonest forms of insurance.

Phoenix Ins. Co. vs. Transportation Co., 117 U. S. 312.

California Ins. Co. vs. Union Co., 133 U. S. 387.

Ins. Co. vs. Merrill, 155 Mass., 404.

Phillipsburg Co. vs. Ins. Co., 160 Pa., St. 350.

Ross vs. Ins. Co., 56 N. J. Eq. 41, (38 Atl. 22.)

Joyce on Ins. Secs. 2800-2803.

5th. This statute does not deprive plaintiff in error of its property without due process of law because it changes the the pre-existing common law rules. Very few statutes imposing duties or liabilities under the police power do not cause such a change. The statutes above noted requiring fences built along the track, had this effect. The same objection was made in this court to those statutes that abolished the common law defense as to the negligence of fellow servants in actions by employees for negligence.

This court has repeatedly held that it was within the power of the state to make the railway liable to a servant for a fellow servant's negligence, and the deprivation of such common law defense is not within the 14th amendment.

Tullis vs. R. R. Co., U S. , 20 S. C. R. 136.

M. P. R. R. vs. Mackey, 127 U. S., 205.

Minneapolis R. R. vs. Herrick, 127 U. S. 210.

For many years the decisions of the Illinois courts and of other states were upheld applying in place of the doctrine of contributory negligence the doctrine of comparative negligence. The Nebraska statute does not more offend against the constitution than this doctrine. The common law defense, arising from the slightest contributory negligence was not such property but that the courts of Illinois, Georgia and many other states could deprive defendants by judicial decisions in cases of negligence. It would seem to be within the power of the legislature to pass a law which does not thus offend more than judicial precedents.

Does not Deny Equal Protection of the Law.

The equal protection of the laws which is guaranteed by the fourteenth amendment of the constitution, does not forbid classification of subjects of legislation. Such has been the repeated holdings of this court.

In the case of A. T. & S. F. R. Co. vs. Mathews, 174 U. S. 101, a statute of Kansas allowing the plaintiff to recover an attorney's fee in case of recovery against a railroad company for damages occasioned by fire, Judge Brewer in delivering the opinion of the court says:

> "The equal protection of the laws which is guaranteed by the fourteenth amendment, does not forbid classification. It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus when the legislature imposes on railroad corporations a double liability for stock killed by a passing train, it says in effect that if suit be brought against a railroad company for stock killed by one of its trains, it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damages it has done, but twice that amount. If it succeeds it recovers nothing. On the other hand, if

it should sue an individual for destruction of its live stock, it could under no circumstances recover any more than the value of the stock. So that it may be said in the matter of liability, in case of litigation, it is not placed on an equality with other corporations or individuals; yet this court has unanonimously said that this difference of liability, this inequality of right in the courts is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In the case of New York etc., vs. Town of Bristol, 151 U. S. 556, Chief Justice Fuller says:

"The conclusion of this court has been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public and they are intrusted with the right of eminent domain only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. That there is no unjust discrimination and no denial of the equal protection of the law in regluations applicable to all railroad corporations alike. And that the adjudications of the highest court of a state that in such particulars a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States."

In Charlotte etc. R. R. Co. vs. Gibbs, 142 U. S. 386, speaking of the power of the states to pass laws regulating railroad companies, Mr. Justice Field says:

"That regulations may extend to all measures deemed essential not only to secure the safety of passengers and freight, but to promote the convenience of the public in transacting business with them. In requiring this there is no encroachment upon the fourteenth amendment."

In Minneapolis etc. R. R. Co. vs. Emmons, 149 U. S. 364, the validity of a statute of the state of Minnesota making railroad companies liable for treble damages for stock killed on account of failure to fence its road was involved. It was held valid. In the opinion it is said:

> "The extent of the obligations and duties required of railway corporations or companies by their charter does not create any limitation upon the state against imposing all such further duties as may be deemed essential or importamt for the safety of the public, the security of passengers and employees or the protection of the property of adjoining owners."

The case of M. P. Ry. Co. vs. Mackey, 127 U. S. 205, is in point. In this case, speaking of the constitutionality of the statute of Kansas, making the railroad companies liable for damages sustained by its employees, caused by the negligence of fellow servants, says:

> "The hazardous character of the business of operating railroads, would seem to call for special legislation with respect to a railroad corporation, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity and all railroad corporations are without distinction made subject to the same liabilities, As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to a carrier by canal and stage coaches.and to persons and corporations using steam in manufacturies."

The foregoing decision is distinctly approved and quoted with approval in the late case of Tullis vs. L. E. & W. R. R. Co., U. S. 20 Sup. Ct. Rep. 136, and in R. R. Co. vs. Mathews, 169 U. S. 25, and also in C. K. & W. R. R. vs. Pontius, 157 U. S. 209. Such legislation has been upheld in many states.

In the case of R. R. Co. vs. Paul, 37 L. R. A. Rep., 504, the supreme court of Arkansas, where a similar question is involved, says:

> "A statute imposing certain duties and liabilities on one class of corporations only, does not deny them the equal protection of the laws if the peculiar character of the business of the corporation is sufficient to justify this discrimination."

And this was affirmed in St. Louis R.R. Co. vs. Paul, 173 U. S. 404.

The supreme court of Missouri speaking of the statute making railroad companies liable for all fires set out by their locomotive engines, in the case of Mathews vs. R. R. Co., 121 Mo. 298, says:

> "If it could be shown that this statute imposes a burden on railroads from which it exempts others under the same or similar circumstances, then it would be open to the criticism that it deprives railroad companies of the equal protection of the law. But if the circumstances are different, if no other person, natural or artificial, is authorized to condemn or purchase a strip of land running through the lands of others, on its route and to run trains propelled by steam over its road at all times, day or night, and at all seasons, wet or dry, and using engines that scatter fire on the bordering property, though operated with a degree of care that amounts to faultlessness, all for its own profit, then we say that the statute is not obnoxious to the charge of denying railroads the protection it accords to others. So long as the statute imposes these duties on the only agents that have like powers to create similar hazards, it cannot be charged with inequality or unjust discrimination."

The claim of counsel that the statute deprives the plaintiff in error of the equal protection of the laws because it makes a railroad company liable in cases where it is not guilty of any fault or negligence, is entirely untenable.

In the recent case of R. R. Co. vs. Mathews, 169 U. S. 65, the Supreme Court of the United States held constitutional the statute of Missouri, rendering the railroad absolutely liable for all damages caused by fire set out by its engines. The basis of the liability is the dangerous character of the instrumentality used.

The reasoning in this case applies with equal force to the Nebraska statute in question. The court says:

> "To require the utmost care and diligence of a railroad corporation in taking precautions against the escape of fire from their engines might not afford sufficient protection to the owners of property in the neighborhood of railroads. When both parties are entirely faultless, the legislature may perhaps consider it to be just that the duty of insuring private property along its line from injury caused by the use of dangerous instruments, should rest on the railroad company, which employs the instruments, and creates the peril for his own profit, rather than on the owner of the property who has no control over or interest in these instruments."

In the same opinion the court further says:

> "The statute is not a penal one, imposing a punishment for the violation of a law, but is purely remedial, making a party doing a harmful act for its own profit, liable in damages to an innocent party injured thereby, and giving to that party the whole damages measured by the injury received. The statute is the constitutional and valid exercise of the legislative power of the state, and applies to all railroad corporations alike. Consequently it neither violates any contract between the state and the railroad company, nor deprives the company of its property without due process of law, nor yet denies it equal protection of the laws."

See also on this point the cases of Tullis vs. R. R. Co., U. S. 20 Sup. Ct. Rep. 136 and R. R. Co., vs. Mackey, 127 U. S. 205., in which it is held that the statutes of sev-

eral states by which railroad companies are held liable for damages sustained by their employees through the negligence of fellow servants, do not deny the equal protection of the law.

It is claimed by the railroad company that the provisions of the statute are harsh and oppressive. This claim we believe we have shown to be without foundation, but conceding such claim to be true, that would not render such statute unconstitutional.

In the case of Missouri Pac. Ry. Co. vs. Humes, 115 U. S. 512, this court holds that if a state law be within the legitimate sphere of legislative power and enforced according to general rules prescribed for security of private rights, their harshness, injustice and oppressiveness will not invalidate them as affecting life, liberty or property without due process of law.

Mr. Justice Field in his opinion says:

> "It is hardly necessary to say that the hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures."

In the case of New York etc., R. R. Co. vs. Town of Bristol, 151 U. S. 556, it was held that a statute of Connecticut was constitutional which required railroad companies to pay the expense of abolishing grade crossings. The contention of the railroad company was that the provisions of the act was so unreasonable and unjust as to bring it within the constitutional inhibiton. On this question Chief Justice Fuller says:

> "But this court cannot proceed upon general ideas of the requirements of natural justice, apart from the provisons of the constitution supposed to be involved. As

observed by Mr. Justice Miller in Davidson vs. New Orleans, 96 U. S. 97 ,104, the 14th amendment cannot be availed of as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against him, and of the merits of the legislation on which such decision may be founded."

We submit that the judgment of the Supreme Court of Nebraska should be affirmed.

THOMAS C. MUNGER and
JOHN M. STEWART,
Attorneys for Defendant in Error.
A. E. HARVEY, of Counsel.